Editor's note: Reconsideration granted; decision vacated -- See Myrtle Jaycox, Serafina Anelon, and Hilma Eakon, 64 IBLA 97 (May 17, 1982)

SERAFINA ANELON

IBLA 75-550 Decided September 22, 1975

Appeal from that portion of a decision of the Alaska State Office, Bureau of Land Management, rejecting Alaska Native Allotment application AA 6153.

Affirmed.

1. Alaska: Native Allotments -- Withdrawals and Reservations: Effect of

   Withdrawn lands are not open to appropriation under the Native Allotment Act. An Alaska Native Allotment application is properly rejected where the applicant fails to show substantial use and occupancy at least potentially to the exclusion of others and not mere intermittent use.

2. Withdrawals and Reservations: Generally -- Withdrawals and Reservations: Effect of

   An applicant's opinion that a withdrawal has not served, or does not serve, any useful purpose does not vitiate the effect of the withdrawal to bar appropriation of the land. Likewise, the extended period of time that a withdrawal has been in effect does not vitiate such impact.

APPEARANCES: Henry W. Cavallera, Esq., and Frederick Torrisi, Esq., of Alaska Legal Services Corp., for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Serafina Anelon filed a Native Allotment application in March 1971, pursuant to 43 U.S.C. § 270-1 through § 270-3 (1970), and 43 CFR 2561. Her application described two separate parcels. Parcel "B" embraced approximately 120 acres and is situated directly

across the river from Newhalen Village. Parcel "A," 40 acres, lies approximately 115 miles southwesterly on Kvichak Bay. A field examination verified applicant's use and occupancy of parcel "A" and recommended that allotment for tract "A" be approved. However, the same field examiners recommended that the application covering parcel "B" be rejected because most of the land in that parcel had been withdrawn for Power Site Reserve No. 485 in 1915 and for the further reason that the small remaining acreage showed no signs of use and occupancy. The Alaska State Office, Bureau of Land Management (BLM), adopted the recommendation of the field examiners and rejected the application insofar at it covered parcel "B." This appeal followed.

Appellant admits that the greater area of parcel "B" was withdrawn by Power Site Reserve 485 in 1915 and not open to Native Allotment application. She argues, nevertheless, that the allotment should be allowed because the land has not been used for the purposes for which it was withdrawn during the 60-year period since 1915, and is now recommended for restoration. She argues that even if the withdrawal is a bar that she should be granted the small acreage outside the limits of the withdrawal. Appellant asserts that the rejection of parcel "B" is "a breach of the fiduciary duty owed by federal officers to Natives because it was delayed until appellant could not amend her application for her Native allotment." She further asserts that she is entitled to a fair hearing.

[1] Appellant fails to show or allege error in the decision insofar as it rejected her application for the lands covered by the power site withdrawal. The law is well established that withdrawn lands are not open to appropriation under the Native Allotment Act and that no rights may be initiated under that Act by occupation and use of withdrawn lands. David Capjohn, 14 IBLA 330 (1974); Susie Ondola, 17 IBLA 359 (1974).

[2] An applicant's opinion that a withdrawal has not served, or does not serve, any useful purpose does not vitiate its effect to bar appropriation of the land. Consolidated Mines & Smelting Co., Ltd., A-27019 (June 28, 1954). The extended period of time that a withdrawal has been in effect similarly does not vitiate its impact. United States v. Consolidated Mines & Smelting Co., Ltd., 455 F.2d 432, 442-46 (9th Cir. 1971).

It appears to be the view of appellant's counsel that had appellant been informed of the withdrawal in the 9-month period between the filing of her application and the repeal of the Allotment Act, she could have amended her application to claim use of a different 120-acre parcel. Such an assertion implies that she could have proved not less than 5 years of use and occupancy of

any parcel which was open and which would take her fancy. However, since appellant's application was filed in March 1971, it is difficult to envisage that the 5-year requirements could be met timely.

The arguments and proofs in this case mandate reliance on the report of the field examiners (the same examiners who found appellant used and occupied parcel "A" and who recommended clear list of that parcel) that the land outside the area of withdrawal shows no evidence of use or occupancy. Appellant's husband and other supporting witnesses state that the parcel "B" has been and is in use by others for berry picking. The proximity of parcel "B" to the village impels the conclusion that others use the land in common and that no one person uses or occupies that land to the potential exclusion of any other. Where a Native fails to show at least 5 years of potentially exclusive continuous use and occupancy his application is properly rejected. See Gregory Anelon, Sr., 21 IBLA 230 (1975); Jack Koutchak, 21 IBLA 71 (1975).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Douglas E. Henriques
Administrative Judge